Eurika Durr

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Ms. Durr

I am filing my Motion for Reconsideration in Case No. 13-01 a second time since I noticed that I filed it before I officially was served with the EAB's order of April 16, 2013. I was operating from a copy of the order I downloaded from the EAB website on April 17, 2013. I did not receive my official copy served by mail until April 24, 2013.

Sincerely,

Peter Bormuth
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Re: Appeal No. UIC 13-01

Permit No. MI-075-2D-0009

BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

In re West Bay Exploration Company

Traverse City, Michigan

West Bay 22 SWD

Permit No. MI-075-2D-0009

Appeal No. UIC 13-01

PETITIONER'S MOTION FOR RECONSIDERATION UNDER 40 C.F.R. 124.19(m)

OF EAB ORDER DISMISSING PETITION FOR REVIEW AS MOOT

Peter Bormuth – Petitioner

In Pro Per

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CONSTITUTIONAL PROVISIONS

Amendment V, United States Constitution in pertinent part provides:

"No person shall be deprived of life, liberty, or property, without due process of law."

Amendment I, United States Constitution in pertinent part provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF COMPLIANCE

The Petitioner certifies that his Motion To Reconsider contains 3,775 words according to the Microsoft Word program used to compose it.

CONCURRENCE

The Petitioner contacted Kris P. Vezner, Associate Regional Counsel of U.S. EPA Region 5, by e-mail to request concurrence for his Motion to Reconsider on April 17,2013. Vezner denied Petitioner's request by e-mail on April 17, 2013.

PETITIONER'S MOTION FOR RECONSIDERATION OF EAB ORDER DATED 4-16-13 DISMISSING PETITION UIC APPEAL NO. 13-01 FOR REVIEW AS MOOT

INTRODUCTION

Petitioner, Peter Bormuth, proceeding *pro se*, respectfully files this Motion For Reconsideration of the EAB Order dated 4-16-13 Dismissing Petition UIC Appeal No. 13-01 as Moot. The Petition involves a UIC permit application for a Class II Oil Waste Disposal Well filed by West Bay Exploration Co. of Traverse City Michigan for the purpose of non-commercial disposal of brine from multiple producing wells. The application proposed the Salina A-2 Evaporite at a depth of 2,634 feet to 2,662 feet as the upper confining zone. West Bay's lithologic description of this 28 foot thick barrier to the potential upward migration of effluent is: "Anhydrite, dense, hard, white, excellent barrier to flow."

In January 2012 Region 5 issued the draft West Bay permit, UIC Permit No. MI-075-2D-0009. The public comment period ran for 30 days from January 30, 2012. Petitioner did not comment during this period. Region 5 received numerous requests for a public hearing and created a

second public comment period running from April 17, 2012 through June 1, 2012. This period included a public meeting at Columbia Central High School on May 23, 2012. Petitioner provided timely oral comments to Region 5 at the public meeting and expanded on those comments with timely written comments to Region 5 (Anna Miller) via e-mail dated May 29, 2012.

On December 6, 2012, the EPA issued a Response to Comments that superficially addressed Petitioner's comments regarding Draft Permit No. MI-075-2D-0009. Petitioner received this mailing in a timely fashion.

The EPA issued the final permit on December 10, 2012, with an effective date of January 9, 2013. Petitioner then filed a timely Petition for Review on January 8, 2013. On January 14, 2013, Erica Durr, Clerk of the Board sent a letter to Robert Kaplan requiring a Response no later than February 26, 2013. On February 25, 2013 Kris P. Vezner filed the Response for Region 5. On April 8, 2013 Region 5 Director Tinka Hyde sent a letter of notification of the withdrawal of permit No. MI-075-2D-0009. This action was taken under the authority of 40 C.F.R. Section 124.19(j) of the revised rules which went into effect on March 26, 2013. On April 16, 2013 the EAB issued an order Dismissing Petitions 13-01 and 13-02 For Review As Moot. On April 18, 2013 Petitioner filed a Motion To Deny. Petitioner now files this Motion To Reconsider within 10 days of receiving service of the EAB Order dated April 16, 2013.

GROUNDS FOR MOTION

The Petitioner files for reconsideration on multiple grounds. First, the EPA violated 40 C.F.R. § 124.19(j) by not filing a Motion since over 30 days had elapsed since the EPA responded to

Petitioner. Second, the EPA and the EAB violated 40 C.F.R. § 124. 19(a) by filing Sandra K. Yerman's Petition For Review (13-02) dated February 13, 2013. Third, the EAB abused their discretion under 40 C.F.R. § 124.19(a)(4)(i)(A)(B) by filing Sandra K. Yerman's Petition. Fourth the EAB abused their discretion by dismissing Petitioner's Petition as moot. Fifth, the EAB violated Petitioner's right to Due Process under the Fifth Amendment. Sixth, the EAB violated petitioner's right to Administrative Due Process. Seventh, the EAB discriminated against the Petitioner under the First Amendment.

RELIEF SOUGHT

The Petitioner respectfully asks the EAB for the following relief:

1) Petitioner requests the Board to vacate its Order of April 16, 2013 dismissing Petition UIC Appeal No. 13-01 as Moot.
2) Petitioner requests the Board to Deny Withdrawal of the Permit by Region 5 Administrator, Tinka Hyde.
3) Petitioner requests the Board to address the issues of material fact presented for review in Petition 13-01.
4) Petitioner requests that Petition 13-02 be dismissed from the docket.

LEGAL ARGUMENT

The Petitioner claims that the EPA violated 40 C.F.R. § 124.19(j) by not filing a Motion since over 30 days had elapsed since the EPA responded to Petitioner. REVISED RULE 40 CFR 124.19(j) effective March 26, 2013, states: (j) "*Withdrawal of permit or portions of permit by Regional*

Administrator. The Regional Administrator, **at any time prior to 30 days after the Regional Administrator files its response to the petition for review under paragraph (b) of this section,** may, upon notification to the Environmental Appeals Board and any interested parties, withdraw the permit and prepare a new draft permit under § 124.6 addressing the portions so withdrawn." The Petitioner filed his Petition for Review on January 8, 2013. Region 5 responded on February 25, 2013. Region 5 did not issue their letter of withdrawal until April 8, 2013. Once the 30 day period has expired the Regional Administrator must obtain, **by motion**, a voluntary remand of the permit before withdrawing it. No Motion was filed by Region 5 therefore the EPA's Withdrawal of Permit by the Region 5 Administrator must be denied by the Environmental Appeals Board. The ends of justice did not require a modification or relaxing of 40 CFR 124.19(j) in this case. Indeed, the 30 day provision was added to the new Procedural Rules indicating that the EAB deliberately intended to deny unilateral withdrawal by the Region if they failed to act within 30 days. "[t]here may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case." *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964), *rev'd on other grounds*, 382 U.S. 46 (1965). The EAB Order of April 16, 2013 must be vacated upon reconsideration.

The Petitioner notes that the EPA and the EAB violated 40 C.F.R. § 124. 19(a) by filing Sandra K. Yerman's Petition for Review (13-02) dated February 13, 2013. When determining whether to grant review of petitions filed pursuant to the Board must first consider whether each petitioner has fulfilled certain threshold procedural requirements including timeliness, standing, and issue preservation. 40 C.F.R. 124.19(a); *accord In re Circle T Feedlot, Inc.*, NPDES Appeal Nos. 09-02 & 09-03, slip op. at 4 (EAB June 7, 2010), 14 E.A.D. ; *In re Avon Custom*

Mixing Servs., 10 E.A.D. 700, 704-08 (EAB 2002). Specifically, petitions must be filed within thirty days after issuance of the permit. 40 C.F.R. § 124.19(a). The EPA issued the final permit on December 10, 2012, with an effective date of January 9, 2013. Yerman did not file her petition until February 13, 2013, over a full month after the closing date. Failure to file a petition for review by the filing deadline will ordinarily result in dismissal of the petition on timeliness grounds, as the Board strictly construes threshold procedural requirements. (see *In re Town of Marshfield,* NPDES Appeal No. 07-03, at 4 (Mar. 27, 2007) (Order Denying Review); *In re Puma Geothermal Venture,* 9 E.A.D. 243, 273 (EAB 2000). Yerman's claim that she did not receive service should have been carefully scrutinized since she has made a similar claim in the past. (see *In Re Environmental Disposal Systems, Inc* (EAB 1998). Moreover, since hearsay is allowed in these proceedings, the Petitioner notes that when he spoke with Ms. Yerman on April 21, 2013, her minivan and yard and porch were as cluttered and sloppy as her petition. The Petitioner suspects Yerman's claim that she was not served by the EPA stems from this inherent untidiness, not lack of service, and suggests the merits of organization and keeping a file on a case as remedies, rather than making claims that harm other petitioners.

Nor did Yerman's petition meet the requirements of 124.19(a)(4)(i)(A)(B) which demand the petitioner identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed. In reviewing Yerman's petition which the Petitioner first saw on April 17, 2013, this Petitioner cannot find anything vaguely meeting the requirements of a finding of scientific fact or conclusion of law that is clearly erroneous, or an exercise of discretion or an important policy consideration that the Environmental Appeals

Board should review. While the Board the endeavors to construe liberally objections raised by parties proceeding *pro se*, so as to fairly identify the substance of the arguments being raised, the Board nonetheless traditionally expects such petitions "to articulate some supportable reason or reasons as to why the permitting authority erred or why review is otherwise warranted." See *In re Sutter Power Plant,* 8 E.A.D. at 688 (EAB 1999) (citing *In re Beckman Prod. Servs.,* 5 E.A.D. 10, 19 (EAB 1994). See also *In re City of Attleboro,* NPDES Appeal No. 08-08, slip op. at 61 (EAB Dec. 15, 2009) (explaining that, because petitioner bears the burden of demonstrating that review is warranted, the Board "will not entertain vague or unsubstantiated claims")); *In re City of Moscow,* 10 E.A.D. 135, 172 (EAB 2001) (denying review where petitioner raised vague and unsubstantiated concerns and failed to point to any clearly erroneous findings of fact or conclusions of law in the Region's permitting decision or to identify any specific permit conditions that gave rise to those concerns)). Will the EAB please tell the Petitioner why this standard is conveniently relaxed for Ms. Yerman?

The Petitioner claims the EAB abused their discretion by dismissing Petitioner's Petition as moot. The Petitioner set forth a legitimate scientific argument on the geological site of the well, complete with peer reviewed scientific studies. "In reviewing an underground injection well permit application, the Region has a regulatory obligation to consider whether geological conditions may allow the movement of any contaminant to underground sources of drinking water." *In re Stonehaven Energy Management,* UTC Appeal No. 12-02 LLC Permit No. PAS2DOIOBVEN (EAB March 28, 2013). Petitioner's claim that the anhydrite will transform to gypsum upon contact with water must be addressed by the EAB and cannot be dismissed under 40 C.F.R. § 124.19(j) because the EPA and EAB allowed Yerman to file a late and deficient

petition. 40 C.F.R. § 146.62(c)(1)(2) specifically states that the injection zone must have "sufficient permeability, porosity, thickness and areal extent to prevent migration of fluids into USDWs" and be free of faults and fractures that might allow fluid movement. The Courts have ruled that permitting authorities have "an affirmative duty to inquire into and consider all relevant facts" pertaining to the specific statutory and regulatory criteria established for each permit program, and they must ensure they have developed an adequate record upon which to make a reasoned permit decision. (see *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965). The Petitioner claims he has provided the EAB with reasonably trustworthy information and data such that the totality of the facts and circumstances within the Board's knowledge are sufficient to warrant a *firm belief* that migration of hazardous constituents from the injection zone will occur. [referencing 69 Fed. Reg. 15,328, 15,330 (Mar. 25, 2004)]. Moreover in Region 5 Response to Comments document of December 6, 2012, they admit that the fluid will migrate into the next confining zone that will accept it. The Board has abused its discretion in dismissing SIC 13-01. The APA provides that reviewable exercises of discretion are reviewed under the "abuse of discretion" standard. 5 U.S.C. § 706(2)(A). Discretion can be abused in many ways. For example, a departure from agency precedent is an abuse of discretion. "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. . . ." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

The EAB has also violated the Petitioner's right to Due Process. **Amendment V, United States Constitution** in pertinent part provides: "No person shall be deprived of life, liberty, or

property, without due process of law." The Fifth Amendment's procedural Due Process Clause places limits on federal administrative agencies adjudicatory (judicial) power. The Administrative Procedure Act (5U.S.C.A. §§ 551–706 [Supp. 1993]) governs the practice and proceedings before federal administrative agencies. The Right to Prior Notice is ordinarily a due process requirement. The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). The Petitioner was never informed by the EPA or the EAB that Yerman's late petition was placed on the docket or he would have filed a motion objecting to that action. The EPA has used that late filing to withdraw their permit under 40 C.F.R. § 124.19(j), depriving the petitioner of his right to a hearing. Ordinarily, a "hearing" encompasses the right to present evidence and argument. Under the flexible due process standard, however, a "paper hearing" will provide adequate protection of due process protected interests. (see *Hewitt v. Helms,* 459 U.S. 460, 472 (1983)). The EAB's order of April 16, 2013 is a direct violation of petitioner's right to such a paper hearing. The Petitioner notes that while Due process does not constrain an agency's choice of decision making procedures when it acts in a legislative manner, i.e., when it makes a policy-based decision that purports to apply to a class of individuals, Due process does limit the agency's choice of procedures when it makes a decision that uniquely affects an individual on grounds that are particularized to the individual. (see Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 4.6 at 167 (3d ed. 1994).

The Petitioner's right to administrative due process has been violated by the EAB's arbitrary enforcement of 40 C.F.R. § 124.19(a), 40 C.F.R. 124.19(a)(4)(i)(A)(B), and 40 C.F.R. § 124.19(j).

The Petitioner notes that the failure of an administrative agency to follow its own procedural rules violates the principle that agencies are bound by their own regulations. *Vitarilli v. Seaton*, 359 U.S. 535, 547 (1959); *see also Service v. Dulles*, 354 U.S. 363 (1957); *see generally* Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 Admin. L. Rev. 653, 678-86 (1992) (discussing a possible due process foundation to the rule that agencies are bound by their own regulations); see also David A. Straus, *Due Process, Government Inaction, and Private Wrongs*; Sup. Ct. Rev. 53 (1989) "The language of 5 U.S.C. § 552(a)(2) "strongly suggests" that if an agency does comply with the APA's publication requirements, the materials identified in APA § 552(a) "may be `relied on, used, or cited as precedent' *against the agency* although they do not serve to bind the public." Strauss, *supra*, at 1467-68 (footnote omitted). He also observes that *Vietnam Veterans of Am. v. Secretary of the Navy*, 43 F.2d 528, 536-37 (D.C. Cir. 1988), collects and discusses several cases in which the District of Columbia Circuit has bound agency to otherwise nonbinding pronouncements. *Id.* at 1473. EAB rulings also adhere to this high standard. *In re ConocoPhillips Co.*, 13 E.A.D. 768, 776-77 (EAB 2008) (emphasizing that "procedures outlined in the Agency's regulations serve an important function related to the efficiency and integrity of the overall administrative scheme" and thus "procedural arguments or errors" should not be viewed as "inherently insignificant"). While the EAB can claim the authority to relax or modify their procedural rules in the interests of justice, they cannot do so when their action creates substantial prejudice and irreparable harm to another party to the proceeding as in this case. "It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business

before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." *American Farm Lines v. Black Ball Freight Service,* 397 U.S. 532, 539 (1970); *NLRB v. Monsanto Chemical Co.,* 205 F.2d 763, 764. *And see NLRB v. Grace Co.,* 184 F.2d 126, 129; *Sun Oil Co. v. FPC,* 256 F.2d 233; *McKenna v. Seaton,* 104 U.S. App. D.C. 50, 259 F.2d 780. If substantial prejudice exists, "an executive agency must be rigorously held to the standards by which it professes its action to be judged." *See Securities & Exchange Commission v. Chenery Corp.,* 318 U. S. 80 (1943). Substantial prejudice exists in this case since the decision to allow Yerman to file a late and deficient petition has caused irreparable harm to the Petitioner who has seen his petition and due process rights disappear as "moot" without notification and without a hearing.

Finally the Petitioner alleges religious prejudice under the First Amendment. Petitioner, as a person who commented on UIC Permit No. MI-075-2D-0009, was similarly situated to Sandra K. Yerman before the EPA and the EAB allowed this Christian woman special privileges under their rules and procedures. Petitioner claims the EPA and EAB did this deliberately to harm his interests because of his comments opposing the Christian religion. As a Pagan Druid and animist shaman the Petitioner is enjoined by his religion to speak for the Earth and all non-human creatures who lack a voice in our affairs and the EPA and the EAB have conspired to deny the Petitioner's Exercise of Free Speech and Religion in order to grant unwarranted priviledges to a Christian. The Petitioner is tired of current situation where government employees and officials illegally discriminate against non-christians and actively try to promote the establishment of the Christian religion in violation of our Constitution. (See *Bormuth v. Dahlem,* Case No. 11-2070 (6th Cir. 2012) (cert denied); *Bormuth v. City of Jackson et al,* Case No. 12-11235 (E.D. Mich) ;

and *In Re Bormuth,* Case No. 13-1194 (6th Cir.)). Judicial review of final agency action is presumptively available under the APA. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *see also* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Moreover, the presumption favoring review is strong. *See, e.g., Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). If the EAB does not vacate their Order of 4-16-13 and dismiss Yerman's late and deficient petition from the docket, the Petitioner will file in Federal Court.

CONCLUSION

WHEREFORE the Petitioner respectfully requests that the EAB vacate its Order of April 16, 2013 dismissing Petition UIC Appeal No. 13-01 as Moot; deny Withdrawal of the Permit by Region 5 Administrator, Tinka Hyde; address the issues of material fact presented for review in Petition 13-01; and dismiss Petition 13-02 from the docket.

Respectfully submitted,

Peter Bormuth

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Dated: May 7, 2013

11.

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2013, I mailed a copy of my Motion To Reconsider to Kris P. Vezner, Associate Regional Counsel, U.S. EPA, Region 5, 77 W. Jackson Blvd. (C-14J), Chicago, IL 60604 by regular mail.

By: Peter Bormuth

In Pro Per

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Dated May 7, 2013

12.